

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JAMES ERICKSON,

Appellant,

v.

SUPERINTENDENT OF PUBLIC
INSTRUCTION,

Respondent.

) Case No. RIF-01-0003

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) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

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I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on May 2, 2002.

1.2 **Appearances.** Stephen Oelrich, Attorney at Law, represented Appellant James Erickson. Stewart Johnston, Assistant Attorney General, represented Respondent Superintendent of Public Instruction.

1.3 **Nature of Appeal.** This is an appeal of a reduction in force due to a lack of funds.

1.4 **Citations Discussed.** WAC 356-30-330; O’Gorman v. Central Washington University, PAB No. L93-018 (1995); Talbott and Hobson v. Dep’t of Social and Health Services, PAB Case

Nos. L81-2 & L81-3 (Murphy, Hrgs, Exam.)(1981); Amundsen v. Dep't of Labor and Industries, PAB Case No. L85-1 (1985), aff'd (Thurston Co. Super. Ct. No. 85-2-02185-9 (1987)).

II. FINDINGS OF FACT

2.1 Appellant James Erickson was a Public Information Officer (PIO) 2 and permanent employee for Respondent Office of Superintendent of Public Instruction (OSPI) in the Communications Office. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on July 6, 2001.

2.2 Appellant has been employed by the state of Washington for approximately 15 years, and he worked for the Office of Superintendent of Public Instruction for six years. The PIO 2 position was the only classification in which Appellant held permanent status during his tenure as a state employee.

2.3 As a PIO 2, Appellant was responsible for managing the OSPI Resource Center by distributing a variety of materials and publications; reordering stock; acting as a liaison between the agency and outside entities in responding to their needs for publications; and he maintained a toll-free publications hotline. Appellant also served as a photographer and reporter for two newsletters and handled their distribution. Appellant held the only PIO 2 position within OSPI.

2.4 Appellant's salary was funded by two separate funds: 50 percent from the state general fund appropriation and 50 percent from the center for the improvement of student learning (CISL) fund.

1 2.5 Jennifer Priddy is the Budget Director for OSPI. She testified that during the 1999-2001
2 biennium, the Washington State Legislature appropriated \$1,260,000 for the management of CISL.
3 However, during the 2001-03 biennium, the legislature discontinued all funding for CISL. The
4 legislature also made state office administrative reductions (state general fund) in the amount of
5 \$680,000.

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7 2.6 To implement the new budget, Ms. Priddy helped identify each of the changes made to the
8 state general fund budget to help the agency determine where to make cuts. She testified that
9 elimination of Appellant's position, in addition to another position within the CISL program, was
10 identified as a viable option.
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13 2.7 Ms. Priddy credibly testified that money from the state general fund could have funded the
14 PIO 2 position, however, it would have cost an additional \$27,000 to \$29,000 to the state general
15 fund, which had already been reduced by \$340,000 per year. She concluded that no other state fund
16 sources existed to fully fund the PIO 2 position.
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18 2.8 Thomas Kelly, Deputy Superintendent for General Administration and Operations, was
19 Appellant's appointing authority. Prior to implementing the RIF of Appellant's position, Mr. Kelly
20 consulted with Ms. Priddy and other management staff. Due to the budget reductions, Mr. Kelly
21 was initially faced with eliminating as many as 20 positions. He engaged in a critical functions
22 analysis to determine which positions were most critical to the core mission of the agency of
23 administering basic education programs for the state's K-12 schools.
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1 2.9 Mr. Kelly elected to make eliminations in the Communications Office because a large part
2 of the agency's information clippings and publications distribution tasks were being performed
3 electronically through the agency's website and by email. Mr. Kelly concluded that functions
4 performed by the PIO 2 position could be easily absorbed into other existing positions because a
5 majority of the tasks Appellant performed were clerical in nature. As a result of the elimination of
6 the CISL funds and the reduction in the state general fund, and after completing the prioritization
7 analysis, Mr. Kelly determined that the PIO 2 position should be RIF'd.

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10 2.10 OSPI RIF'd two employees including Appellant. Other employees were either placed in
11 vacant positions or moved on to other jobs.

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13 2.11 Sheila Emery is the agency's Human Resource Manager. Ms. Emery reviewed Appellant's
14 employment history to determine what layoff options were available to Appellant. Ms. Emery
15 concluded that no other PIO 2 positions existed within Appellant's layoff unit. In addition, she
16 reviewed positions at the same or lower level salary within Appellant's layoff unit, however, none
17 existed. Therefore, she determined that Appellant had no formal layoff options.

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20 2.10 Joe Lee is a Human Resource Consultant 3. Mr. Lee credibly testified that he worked with
21 Appellant in June 2001 to provide him with information regarding his informal options. Although
22 Appellant testified that Mr. Lee did not provide him with any informal options, we find that more
23 likely than not, Appellant was provided with a list of informal options of positions in lower
24 classifications for which he was qualified. The options available to Appellant were secretarial and
25 clerical in nature. After showing the list of available positions to Appellant, Mr. Lee asked
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1 Appellant to notify him if he was interested in any of the positions. Appellant did not contact Mr.
2 Lee.

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4 2.11 By letter dated June 13, 2001, Mr. Kelly informed Appellant of the reduction in force of his
5 position as a Public Information Officer 2 due to a lack of funds, effective June 29, 2001.

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7 2.12 After Appellant's position was eliminated, the remaining duties of his former position were
8 transferred to other members of the Communications Office. The Communications Office also
9 employed a Media Relations Specialist, an exempt position, which existed prior to Appellant's RIF.
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12 2.13 The department's adopted Reduction-in-Force Policy sets forth the reasons for reduction-in-
13 force actions and provides, in part, that RIF actions may be taken as a result of a lack of funds. The
14 policy further indicates that a permanent employee "whose position is scheduled for abolishment ...
15 shall be offered option(s) in lieu of separation." The options are offered in descending order as
16 follows:

17 1. Transfer to a funded and vacant position in the same layoff unit within the
18 agency that satisfies the criteria set forth below:

19 The position is one that:

20 a. the agency intends to fill.

21 b. Is in the current classification of the employee being offered the option or in a
22 classification within which the employee being offered the option previously held
23 permanent status.

24 c. Is at a salary range no lower than the range that would have otherwise been a
bumping option.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent contends that nothing inappropriate occurred in the way the RIF was conducted or the reasons for the RIF. Respondent asserts that a preponderance of the evidence established that the RIF occurred as a result of a lack of funds and for no other reasons. Respondent argues that the appointing authority used his discretion to prioritize and determine what positions would be continued to be funded and what positions he would eliminate. Respondent contends that after the appointing authority concluded his analysis, he elected to eliminate the PIO 2 position because it was not core critical to the agency. Respondent also asserts that Appellant had no formal RIF options within his classification and that Mr. Lee met with Appellant to discuss his informal options. Respondent asserts that Appellant did not communicate to Mr. Lee that he wanted to pursue any of the indicated informal options. Respondent argues that it complied with the WAC 356-3-330 and agency's RIF policy.

3.2 Appellant argues that Respondent did not follow the statute or the WACs in implementing the RIF of his position. Appellant asserts that only half of the funds that supported his position were eliminated and that Respondent could have offered him an opportunity to voluntarily demote to a 50 percent PIO 2 position. Appellant asserts that he was not offered any other positions and was not properly notified of his options. Appellant asserts that numerous positions were advertised on the agency's web page as well as in the newspaper, for which he qualified. He argues, however, that the agency did not offer him the option to return to work in any of these positions. Appellant also contends that his position was selected for elimination because of his age. Appellant argues that OSPI violated WAC 356-30-330 and therefore, he should be fully reinstated.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In an appeal of a reduction-in-force, Respondent has the burden of proof. WAC 358-30-170. Respondent has the burden of proving by a preponderance of the credible evidence that it laid the employee off for the reason stated in the RIF letter. O’Gorman v. Central Washington University, PAB No. L93-018 (1995).

4.3 This Board continues to hold that management has discretion in determining which positions to eliminate and which budgets to reduce when faced with a demonstrated lack of funds. In instituting a RIF for lack of funds, agencies have discretion to determine in good faith which positions to eliminate. Van Jepmond v. Employment Security Dep’t, PAB No. L86-15 (1988), aff’d Thurston Co. Super. Ct. No. 88-2-00274-3 (1989). The positions to be eliminated and those to be retained when the budget is reduced is left to the good faith judgment of management. University of Washington v. Harris, 24 Wn.App., 228, 230, 600 P.2d 653 (1979) rev. denied 93 Wn.2d 1013 (1980). Respondent was within its right to review its existing programs and reduce staff as it deemed appropriate. Sinclair v. Dep’t of General Administration, PAB No. L93-023 (1995). In Wilkes v. Centralia College, PAB No. 3678-L2 (1994), the Board reversed the hearings examiner and held that Respondent had sustained that there was a lack of funds and that the decision as to where to make budget cuts was the responsibility of the Respondent. In Cowden v. University of Washington, PAB No. L93-038 (1994) (Condon, Hrgs, Exam.), the Board held that it could not second-guess management decisions with respect to a layoff when there is a documented lack of funds.

1 4.4 The issue here is whether Respondent complied with WAC 356-30-330(1) when it laid off
2 Appellant because of a lack of funds. WAC 356-30-330, subsection (1) indicates:

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4 1) Employees may be separated in accordance with the statutes and the agencies'
5 approved reduction in force procedures after at least fifteen calendar days' notice
6 in writing, without prejudice, because . . . of lack of funds. . .

7 4.5 Respondent has provided credible evidence that a legitimate lack of funds existed and that
8 Appellant's reduction in force was necessitated because of that lack of funds. OSPI was required to
9 implement a reduction in funding and Respondent appropriately used its discretion to eliminate
10 Appellant's position. In this case, Respondent has shown that a lack of funds existed and has met
11 its burden of proof that the elimination of Appellant's position complied with the requirements of
12 WAC 356-30-330.

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14 4.6 The second issue presented is whether Respondent provided Appellant with appropriate
15 layoff options. WAC 356-30-330(3)(b) indicates that "options in lieu of separation by reduction in
16 force shall be offered by an agency . . ." WAC 356-30-330(3)(f) indicates that a permanent status
17 employee scheduled for layoff "may not exercise a bumping option in lieu of separation . . . if there
18 is within the agency a vacant position which . . . the agency intends to fill; is in the current
19 classification of the employee being offered the option, or in a classification within which the
20 employee being offered the option previously held permanent status."

21 4.7 The record supports there were no other PIO 2 positions within the Communications Office
22 and there were no vacant lower classes in the PIO class series within the agency. Furthermore,
23 Appellant held no prior permanent status positions and had no options to other classes. Respondent
24 conducted a search of additional options in lower classes, and Mr. Lee provided Appellant with
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1 those options. However, Appellant did not respond. WAC 356-3-330 does not require an agency to
2 create a half-time position when faced with a lack of funds.

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4 4.8 Appellant's argument that his position was eliminated based on his age is not supported by
5 the record.

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7 4.9 Respondent has met its burden of proof that a lack of funds existed and the appeal of James
8 Erickson should be denied.

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10 **V. ORDER**

11 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of James Erickson is denied.

12 DATED this _____ day of _____, 2002.

13 WASHINGTON STATE PERSONNEL APPEALS BOARD

14
15 _____
Walter T. Hubbard, Chair

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17 _____
Gerald L. Morgen, Vice Chair